

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Robert J. Bonds, Circuit Court Judge

Case No. 2018-CP-07-0562

Earnest Stewart Diase,

Petitioner,

vs.

The State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

Table of Authorities..... 2

Questions Presented 4

Statement of the Case5

Statement of the Facts7

Argument..... 9

 I. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to object to inadmissible hearsay testimony by EMTs that they had questioned the minor child about who hurt him and he responded by saying something that “sounded like Daddy.”9

 II. Whether the PCR court erred in concluding trial counsel was not ineffective by failing to object to the inadmissible testimony by Frank Mullen that the victim was afraid of Petitioner..... 14

 III. Whether the PCR Court erred in concluding that appellate counsel was not ineffective for failing to raise any argument on appeal regarding the trial court’s denial of trial counsel’s motion to suppress the search warrant executed at 43 Poppy Hill Road and for Petitioner’s clothes he was wearing when interviewed by law enforcement. 16

Conclusion.....21

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. State</i> , 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003)	17
<i>Bennett v. State</i> , 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009)	17
<i>Caprood v. State</i> , 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)	9, 14
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	10,11
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	7, 17-19
<i>Jackson v. Speed</i> , 326 S.C. 289, 304, 486 S.E.2d 750, 758 (1997)	12
<i>Pierce v. State</i> , 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000)	9, 14
<i>Smalls v. State</i> , 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018)	9, 14
<i>Southerland v. State</i> , 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)	16
<i>State v. Daise</i> , 421 S.C. 442, 460–61, 807 S.E.2d 710, 719 (Ct. App. 2017)	15, 16
<i>State v. Davis</i> , 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006)	12, 13
<i>State v. Garcia</i> , 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999)	15, 16
<i>State v. Hughes</i> , 419 S.C. 149, 155, 796 S.E.2d 174, 178 (Ct. App. 2017)	15
<i>State v. Ladner</i> , 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007)	12
<i>State v. Missouri</i> , 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999)	17, 18
<i>State v. Sterling</i> , 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008)	9, 14
<i>Stokes v. State</i> , 308 S.C. 546, 419 S.E.2d 778 (1992)	9, 14
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	9, 13, 14, 16
<i>Thompson v. State</i> , 423 S.C. 235 (2018)	13

U.S. Constitution:

U.S. Const. amend. IV 17

U.S. Const. amend. VI..... 9, 11, 14, 16

U.S. Const. amend. XIV 17

S.C. Rules of Evidence:

S.C. Rule of Evidence 803(2)..... 12

S.C. Rule of Evidence 803(3)..... 15

QUESTIONS PRESENTED

- I. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to object to inadmissible hearsay testimony by EMT that they had questioned the minor child about who hurt him and he responded by saying something that “sounded like Daddy.”
- II. Whether the PCR court erred in concluding trial counsel was not ineffective by failing to object to the inadmissible testimony by Frank Mullen that the victim was afraid of Petitioner.
- III. Whether the PCR Court erred in concluding that appellate counsel was not ineffective for failing to raise any argument on appeal regarding the trial court’s denial of trial counsel’s motion to suppress the search warrant executed at 43 Poppy Hill Road and for Petitioner’s clothes he was wearing when interviewed by law enforcement.

STATEMENT OF THE CASE

Petitioner is currently incarcerated in the South Carolina Department of Corrections serving a life sentence. In December 2009, the Beaufort County Grand Jury indicted Petitioner for two counts of murder (2009-GS-07-02636; -02639), assault and battery with intent to kill or subsequent (2009-GS-07-02595), and trafficking in cocaine 10g - 28g, 3rd or subsequent (2009-GS-07-02594).

On October 8, 2013, Petitioner proceeded to a capital jury trial before the Honorable Carmen T. Mullen. Applicant was represented by William S. McGuire, Casey Secor, and S. Boyd Young, all of the Division of Capital Trial Defense; Mark J. McDougall, Catherine Creely, and Jessica A. Fitts, all of Akin, Gump, Strauss, Hauer Feld, LLP.; and Micah Leddy of The Leddy Law Firm, LLC. Solicitor Isaac McDuffie Stone, III, Chief Deputy Solicitor Sean Thornton, and Deputy Solicitor Carra Henderson prosecuted the case. The jury found Petitioner guilty as indicted. On October 21, 2013, the capital penalty phase began, and on October 23, 2013, the jury sentenced Petitioner to life imprisonment on both counts of murder. Judge Mullen sentenced Petitioner to consecutive sentences of twenty years for assault and battery with intent to kill, thirty years for trafficking cocaine, and twenty years for possession with intent to distribute marijuana.

Petitioner filed a timely notice of appeal, which was perfected by A. Mattison Bogan and Chief Appellate Defender Robert M. Dudek. On appeal, Petitioner argued the trial court erred in (1) allowing hearsay violative of the Confrontation Clause, (2) permitting a witness to comment on the credibility of another witness, (3) admitting testimony that a victim feared Petitioner, (4) failing to require the State to produce materials that amounted to a “handbook” on circumventing a Batson challenge, (5) admitting a photograph of Petitioner in a custodial pose, and (6) admitting

two photographs in which a child victim's birthday cake was visible. Petitioner also argued the court's cumulative errors denied him a fair trial. The Court of Appeals denied the appeal. The remittitur was sent January 22, 2018.

Petitioner then filed an application for post-conviction relief (PCR) on March 13, 2018. On March 17, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Petitioner appeared *pro se*. Assistant Attorney General Danielle Dixon represented Respondent. The PCR Court denied relief and dismissed this application with prejudice by order signed September 29, 2023.

STATEMENT OF FACTS

On November 15, 2009, Jeanine Mullen and her four-year-old child were found dead in their home. App. 1846-1847. The two-year-old was also found at the scene, wounded, and he was rushed to the hospital for treatment. App. 1913-1921. While treating the child in the ambulance, EMTs questioned him about who caused his injuries. App. 1923. During this questioning, he mumbled something that “sounded like Daddy.” App. 1923, 2008. Law enforcement interviewed Petitioner, obtained a search warrant for his residence and clothing, and ultimately arrested Petitioner.

Prior to trial, trial counsel moved to suppress the search warrant used to search the residence at 43 Poppy Hill Road and to obtain the clothing Petitioner was wearing during his interview with police. Trial counsel argued there were violations in the affidavit to the search warrant pursuant to *Franks v. Delaware*. The trial court denied the motion. Appellate counsel did not raise the argument on appeal.

At trial, the State presented evidence that Jeanine Mullen was involved in a romantic relationship with Petitioner. Frank Mullen, Jeanine’s father, testified he arrived at Jeanine’s home between 6:30 and 7:00 p.m. on November 15, 2009, to drop off Jeanine’s two oldest children. When they arrived, the group noticed the doors to Jeanine’s white van were open and it appeared “ransacked.” Inside the home, Frank discovered the older child’s deceased body in the kitchen and Jeanine’s deceased body in her bedroom. The younger child was still alive but he had also been shot.

Around 2:00 a.m. on November 16, 2009, police questioned Petitioner at the home of his friend, Janelle Jay Simmons. Police located and searched a bedroom in that home where Petitioner

stayed and found half a pound of marijuana, an electronic scale, ammunition commonly associated with an AK-47, a set of keys for Jeanine's van, twenty-six grams of crack cocaine, and Petitioner's cell phone. Police also documented a red smear on the door into the bedroom, noted what appeared to be blood on the front-left pocket of Petitioner's jeans, and photographed a cut on Petitioner's right hand. A DNA expert testified the DNA matched the Petitioner and Jeanine on Petitioner's jeans. App. 2485-2573.

The State presented video surveillance from a gas station showing Petitioner with Jeanine's van between 11:45 a.m. and 12:18 p.m. the day of her murder, and Michael Wilson testified he saw Petitioner driving a "white soccer mom van" around dusk that evening. App. 2148. Phone records showed Jeanine's phone called Petitioner's phone eighteen times between 1:39 a.m. and 3:52 p.m. Although most of the calls went to voicemail, the 3:52 p.m. call lasted twenty-eight seconds. Additional records showed Petitioner's phone placed nine calls to Petitioner's phone a text.

The State presented testimony from Janelle Simmons that sometime after 6:00 p.m., he picked up Petitioner on the side of the road and gave him a ride. However, on cross-examination, Simmons contradicted himself and claimed he never picked up Petitioner but only said he did because police threatened to charge him as an accessory. App. 2226; 2311.

A trace evidence expert testified she found gunshot residue on Petitioner's jeans. On cross-examination, she admitted she only found a single particle of gunshot residue on each leg and acknowledged gunshot residue can remain on unwashed clothing for many months. She also testified there was no gunshot residue on Petitioner's sweatshirt.

Finally, the State called Allen Porter, Jeanine's coworker who testified Jeanine and Petitioner were in an abusive relationship and she was afraid of Petitioner. App. 2132; 2217. The State also called Frank Mullen, Jeanine's father who also testified that she was afraid of Petitioner.

ARGUMENT

I. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to object to inadmissible hearsay testimony by EMTs that they had questioned the minor child about who hurt him and he responded by saying something that "sounded like Daddy."

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "Where counsel articulates a **valid** reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992)(emphasis added).

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018)(citations omitted). "The Court will reverse the PCR court's decision when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

At trial, paramedic Shayna Orsen testified she and Crew Chief Danny Tinnel transported the surviving minor child to the hospital. She stated the child was initially unresponsive but became

more responsive in the ambulance. App. 1921. During her testimony, the following exchange occurred:

A: Crew Chief Tinnel was asking [Child 1] who hurt him.

Q: Okay.

Mr. McGuire: Your Honor, I hate to interrupt, but for the record, we need to renew our *Crawford* objection.

The Court: Thank you. It's noted for the record, sir.

By Mr. Stone:

Q: So, I'm sorry. Crew Chief Tinnel—start that over. I'm sorry.

A: Crew Chief Tinnel was asking him questions, basically just to keep him awake and talking, and one of the questions he did ask him was who had hurt him.

Q: And did he answer?

A: It sounded like he said Daddy.

App. 1922-1923.

Later, paramedic Tinnel testified as well and stated, “I was asking [Child 1] who hurt him, and when I asked him who hurt him, he responded Daddy.” App. 1937.

Petitioner's appellate counsel raised this issue to the South Carolina Court of Appeals. Petitioner argued this testimony was hearsay which did not fit any exception to the rule against hearsay. The Court of Appeals ruled this issue was not preserved for appeal because trial counsel did not object to hearsay, only to *Crawford*¹ which is a Confrontation Clause argument.

Petitioner's lead trial counsel testified at PCR. When asked about this statement and why the legal team failed to object to this hearsay testimony, trial counsel offered several explanations. First, he testified the State planned to call this child to testify that Petitioner shot him in the head and the defense team wanted to prevent this from happening. He testified the defense team discussed a strategy to keep the child from testifying. He then testified, “I can't remember if we forged an agreement with the prosecutor, or if we just had a strategy decision to soft-pedal our

¹ *Crawford v. Washington*, 541 U.S. 36 (2004)

objections to the statements that were already—that were coming in the record through Danny Tinnel.” App. 3083. He then testified he believed the hearsay objection would not have been a strong objection because the statement likely fit within the excited utterance exception to the rule against hearsay. App. 3085, 3091-3092.

The PCR Court ruled this testimony was credible and trial counsel articulated a “valid reasonable strategy for not further objecting to hearsay statements of Child 1 and thus was not deficient.” App. 3140. The PCR court erred in this ruling. Trial counsel did not articulate a valid strategy for not objecting. First, the trial counsel did not remember what the discussions with the defense team and with the solicitor entailed regarding the potential testimony of the child. All he could testify to was remembering the defense team did not want the child to testify and he thought they reached some type of agreement with the prosecution to keep the child’s testimony out. He did not remember the specifics of the agreement and he certainly did not testify that the agreement was for him to not object to inadmissible hearsay.

Furthermore, even if an agreement was in place to not object to the testimony from another person so as to prevent the need for the child to testify, trial counsel still in fact objected. He objected that the testimony violated Petitioner’s Sixth Amendment right to confront the witnesses against him pursuant to *Crawford*. So even if the defense team and the prosecution reached an agreement for the defense team to not object to this testimony being admitted through another person so as to prevent the need for the child to testify, the defense team violated that agreement anyway by objecting under *Crawford*. There is no valid strategy for the defense to not object to the inadmissible hearsay under those circumstances and trial counsel did not testify that he had a valid strategy to not object to the inadmissible hearsay.

Second, trial counsel testified in his opinion the testimony would fall under the excited utterance exception to the rule against hearsay anyway. This is incorrect. Hearsay is “an out-of-court statement offered to prove the truth of the matter asserted, and is only admissible if the statement falls under an exception to the hearsay rule.” *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 758 (1997). South Carolina Rule of Evidence 803 (2) states an excited utterance is “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” “A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception. Nonetheless, the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence.” *State v. Davis*, 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006).

Looking at the rule, there are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.

State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007).

Petitioner argued at PCR this statement made by the minor child could not be considered an excited utterance. There was no evidence presented that suggested the child “was under the excitement of the events causing his injury.” Rather the testimony was that the child was groggy and nonresponsive and later became responsive. App. 3003-3006. When the medical professionals first arrived, the child was unconscious. App. 1919. He only responded to painful stimuli. App. 1934. When asked his name, he responded with the wrong name. App. 1921. The only thing the State argued was his statement was an excited utterance because the child was just involved in a traumatic event. However, this Court stated that “relying on the fact that there was a murder, or

that the statement was about the weapon used to commit the murder, is inadequate to establish excited utterance.” *State v. Davis*, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006). This statement from the minor child was not an excited utterance. It did not fall within any exception to the rule against hearsay.²

If the statement was in fact inadmissible hearsay, trial counsel failed to object to it, and trial counsel offered no strategic reason as to why he failed to object to it, then trial counsel’s performance is deficient. *See Thompson v. State*, 423 S.C. 235 (2018) (holding that trial counsel was deficient for failing to object to hearsay in a child sexual abuse case). Here, the statement was hearsay and it did not fit into an exception to the rule against hearsay. Trial counsel did not testify to any valid, strategic reason for failing to object to this statement. That failure to object was a deficient performance by trial counsel pursuant to *Strickland* and *Thompson*.

This deficient performance by trial counsel prejudiced Petitioner as well. Petitioner’s defense was he was not the person who shot and killed the victims in this case. This testimony, which was allowed to be heard by the jury, goes to the central issue in the case. It allowed the surviving victim to tell the jury that Petitioner was the person who shot the victims without requiring the victim to testify and be subject to cross examination. This prejudiced Petitioner to the jury.

Trial counsel was ineffective and the PCR court erred in ruling otherwise. Petitioner’s Sixth Amendment right to counsel was violated by trial counsel’s ineffective assistance.

² Petitioner also argued at PCR that the statement did not fit within the present sense impression exception nor the exception for statements for purposes of medical diagnosis or treatment. The Order of Dismissal did not address these arguments, instead it ruled the statement would likely fit within the excited utterance exception because of the trauma the child experienced. App. 3140.

II. Whether the PCR court erred in concluding trial counsel was not ineffective by failing to object to the inadmissible testimony by Frank Mullen that the victim was afraid of Petitioner.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). “The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial.” *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “Where counsel articulates a **valid** reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992)(emphasis added).

“Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo, with no deference to trial courts.” *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018)(citations omitted). “The Court will reverse the PCR court’s decision when it is controlled by an error of law.” *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

At trial, Frank Mullen, victim Jeanine’s father, testified. Frank testified Jeanine had recently told him she was leaving Petitioner because she “couldn’t deal with him anymore.” App. 2119-2120. When asked if Jeanine was afraid of Petitioner, Frank responded, “Yeah, and that’s— oh, yeah.” App. 2119. Trial counsel did not object to this testimony from Frank Mullen. Appellate counsel did not raise this issue on direct appeal. However, appellate counsel did raise a similar issue that another witness testified the victim Jeanine had told her she was “terribly afraid” of

Petitioner. Trial counsel did object to that testimony and the issue was preserved for appeal. On appeal, appellate counsel argued that testimony was irrelevant and unduly prejudicial. The Court of Appeals of South Carolina addressed the issue raised in *State v. Daise*. The court found this similar testimony by another witness was inadmissible. However, the court found the error to be harmless and the testimony was cumulative to Frank Mullen's similar comment, which was not objected to by trial counsel at all. *See State v. Daise* (“[n]evertheless, this testimony was cumulative to Frank's testimony that his daughter feared Daise and planned to end the relationship, which was presented without objection. Accordingly, we find any inadmissible testimony was cumulative such that Daise cannot demonstrate prejudice.”) *State v. Daise*, 421 S.C. 442, 460–61, 807 S.E.2d 710, 719 (Ct. App. 2017).

From the Court of Appeals' decision in *State v. Daise*, it is clear that this type of comment regarding Jeanine's fear of Petitioner was inadmissible testimony. South Carolina Rule of Evidence “803(3) provides that a statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed is not excluded by the hearsay rule.” *State v. Hughes*, 419 S.C. 149, 155, 796 S.E.2d 174, 178 (Ct. App. 2017). Our supreme court has held that “while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not.” *Id.* (relying on *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999)). The Court of Appeals found these similar statements were inadmissible “because they not only revealed Jeanine's fearful state of mind, they described the reason for it.” *See Daise at 460*, relying on *Garcia*, 334 S.C. at 76,

512 S.E.2d at 509 (“[W]hile the present state of the declarant’s mind is admissible as an exception to hearsay, the reason for the declarant’s state of mind is not.”) *Daise* at 460.

Because trial counsel failed to object to Frank Mullen’s similar comments, the issue was not preserved for appeal. It is clear that had the objection been made and the issue been preserved, the court would have found these statements were inadmissible for the same reasons that the court ruled the other similar statements were inadmissible. Failing to object to this testimony was a deficient performance by trial counsel.

This deficient performance also prejudiced Petitioner as well. This testimony from Frank Mullen allowed the jury to believe that Petitioner committed the crime simply because the defendant feared him. Because this testimony was not relevant at all, this comment was extremely prejudicial to Petitioner.

Trial counsel’s deficient performance prejudiced Petitioner and the PCR court erred in ruling otherwise. Petitioner’s Sixth Amendment right to counsel was violated by trial counsel’s ineffective assistance.

III. Whether the PCR Court erred in concluding that appellate counsel was not ineffective for failing to raise any argument on appeal regarding the trial court’s denial of trial counsel’s motion to suppress the search warrant executed at 43 Poppy Hill Road and for Petitioner’s clothes he was wearing when interviewed by law enforcement.

A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Courts apply *Strickland* when analyzing a claim of ineffective assistance of appellate counsel. Thus, courts must consider (1) whether appellate counsel’s performance was deficient, and (2) whether the applicant was prejudiced by appellate counsel’s deficient performance. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

During a pretrial hearing, trial counsel moved to suppress the search warrant for the residence 43 Poppy Hill Road and for the clothing Petitioner was wearing on the night he was interviewed by police. The argument to suppress by the defense team was based on *Franks v. Delaware*³. In *Franks*, the Supreme Court of the United States held that the Fourth and Fourteenth Amendments gave a defendant the right, in certain circumstances, to challenge the veracity of a warrant affidavit after the warrant had been issued and executed.” *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). The *Franks* court set forth the following test:

- 1) To mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and
- (2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Id. at 554, 524 S.E.2d at 397.

The facts of *Franks* involved an act of commission, where false information was included in the affidavit. However, the *Franks* rule also applies to acts of omission where exculpatory information is not included in the affidavit. This Court has explained that *Franks* addresses more than affirmative false statements by law enforcement:

[T]he *Franks* test also applies to acts of omission in which exculpatory material is left out of the affidavit. To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the

³ *Franks v. Delaware*, 438 U.S. 154 (1978)

issuing judge. There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.

Missouri, 337 S.C. at 554, 524 S.E.2d at 397.

During the pretrial hearing, trial counsel raised two omissions in the affidavits supporting the search warrants: the warrants did not (1) sufficiently indicate the age and circumstances under which the two-year-old identified his father as the shooter or (2) explain that the neighbor who indicated she saw Petitioner identified him as the victim's boyfriend rather than by his name. In a memo which was submitted to the court during the pretrial hearing, and also by Petitioner during his PCR hearing, Petitioner suggested the following modifications⁴ to the first affidavit:

That on November 15, 2009 three people were shot at a residence 20 Player Road in Dale within Beaufort County South Carolina. Two of the people died at the scene. During the investigation information was revealed that Ernest [sic] Daise was the possible shooter in the incident. Witnesses placed ~~the subject~~ a black male at the scene at the time of the incident. The surviving victim is the victim's two-year-old son who told EMS personnel that his "daddy" ~~Ernest Daise~~ was the one who shot him. When asked to identify his father, the child did not respond. The child was severely injured at the time he made the statement and, when asked his own name, said the wrong name. A red in color substance was observed on the subjects [sic] clothing at the time of his interview and the substance appears to be blood. The substance appears as a small spot. The clothing the subject was wearing during his interview is inconsistent with a witness's description of the possible shooter's clothing.

For the second affidavit, Petitioner made the following modifications:

Shortly before 7:00 PM on November 15, 2009, BCSO responded to 20 Player Rd, Dale, SC, regarding the report of three gunshot victims inside the residence. Two of the victims, a woman (Jeanine Mullen), and her four-year-old son, were pronounced dead at the scene; her two-year-old son also sustained a gunshot wound and was transported the [sic] hospital. A witness reported that earlier in the afternoon, ~~Ernest [sic] Daise, who is Jeanine Mullens boyfriend,~~ a black male was observed pulling into the driveway of 20 Player Rd in Ms. Mullen's van, and getting out of the vehicle. ~~Following the shooting incident, while being treated for his injuries, the two year old child said, "Daddy did it."~~ The surviving victim is the victim's two-year-old son who told EMS personnel that his "daddy" ~~Ernest Daise~~ was the one who shot him. When asked to identify his father, the child did not respond.

⁴ The portions that are struck through are portions Petitioner suggested at trial and at PCR should be removed from the affidavits whereas the underlined portions are those Petitioner suggested at trial and at PCR should be added to the affidavit.

The child was severely injured at the time he made the statement and, when asked his own name, said the wrong name. Even though the child's name is Jeremiah, he told EMS personnel that his name was Doug. These are conflicting witness accounts concerning whether the child was able to accurately answer any other questions, or if he was able to answer at all. Ernest [sic] Daise is the child's father. Shortly after 2:00 AM on November 16, 2009, Ernest [sic] Daise was located at 43 Poppy Hill Rd, Burton, SC, where he lives, which is a residence he frequents. He was wearing blue jeans, on which a red stain that appeared to be dried blood was observed just below the left front pocket opening. The substance appears as a small spot. The clothing the subject was wearing during his interview is inconsistent with a witness's description of the possible shooter's clothing. It is believed that based on the foregoing information, evidence of the murder will be located at the premises to be searched.

The ruling of the PCR court swiftly claimed that this argument would not have been successful on appeal because there is sufficient probable cause to support the affidavit without the sections Petitioner suggested be omitted. The PCR court did not elaborate on what exactly amounted to probable cause in these affidavits. The court also did not rely on any case law to make that determination. In three short sentences, the court dismissed this argument without any real analysis or reasoning.

When looking at the affidavit without the sections which Petitioner suggested should be omitted, the affidavit lacked probable cause. The only facts the affidavit rested on were the child's statement and the neighbor's "identification" of Petitioner. The affidavit omitted the greater circumstances surrounding the child's statement including his young age, the fact that he was confused about his own name, and conflicting accounts as to the veracity of the child's statement. Additionally, the neighbor did not identify the male as Earnest Daise, which is what the affidavit purported. Rather, the neighbor identified the male as the victim's boyfriend. Omitting this vital information demonstrated a reckless disregard for the truth in violation of *Franks* and without that reckless disregard for the truth in the affidavit, there was no probable cause to support the search warrant. The trial court erred in denying trial counsel's motion to suppress on this basis.

Appellate counsel's failure to raise this argument in Petitioner's direct appeal prejudiced Petitioner because there is a reasonable probability that Petitioner would have succeeded in this issue on appeal. The PCR court erred in ruling that trial counsel was not ineffective for this deficient performance which prejudiced Petitioner.

CONCLUSION

Petitioner therefore requests the Court grant the writ of certiorari and allow appellate review of the order of dismissal signed by the Honorable Robert J. Bonds.

Respectfully submitted,

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December 18, 2023.